Supreme Court, U.S.
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No. 09-568

IN THE

Supreme Court of the United States

MAREMONT CORPORATION,

Petitioner,

v.

FLORENCE DIANE ST. JOHN, Individually and as Administratrix ad Prosequendum of the Estate of HAROLD ST. JOHN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Petitioner demonstrated that the decision below conflicts with decisions of other courts of appeals on the legal standard that governs whether a defendant has waived the statutory right to remove a case to federal court. Respondent's opposition fails to show otherwise. Respondent cannot overcome petitioner's showing that the decision below wholly undermines not only a defendant's statutory entitlement to remove a diversity case to federal court, but also the purposes of federal diversity jurisdiction. In addition, respondent does not and cannot refute petitioner's showing that the petition presents an issue of national importance because of the need to ensure that the standard for waiver is applied evenly across the country and to ensure that defendants in cases that become removable due to changed circumstances during litigation are not deprived of the right that Congress expressly granted them to a federal forum.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

Petitioner demonstrated (Pet. at 7-13) that the decision below merits review because it conflicts with the decisions of other courts of appeals on the legal standard that governs whether a defendant has waived its right to removal. Respondent's attempts to reconcile and harmonize these decisions and to show that a circuit conflict is not implicated in this case are unavailing.

1. There is no merit to respondent's assertion that "[t]he Third Circuit did not decide the waiver

issue set forth in Maremont's Question Presented." Opp. at 7. As petitioner demonstrated, and respondent does not dispute, the *sole* basis on which the district court remanded the case was its finding that petitioner had waived its right to remove. See Pet. at 5-6. Accordingly, the Third Circuit's statement that it was remanding the case "for essentially the reasons provided by the District Court," Pet. App. 1a, can only mean that it summarily affirmed the district court's waiver ruling.[1]

Respondent's contrary assertion that the Third Circuit granted the motion to remand "based upon a procedural defect in Maremont's Notice of Removal" is at odds with the court of appeals' order. See Opp. at 1. Again, the court of appeals expressly stated that it was granting the remand "for essentially the reasons provided by the District Court," Pet. App. 1a, and those reasons solely concerned waiver. Indeed, the district court *never addressed* the "procedural defect" issue because respondent failed to raise that issue in the district court. Respondent's suggestion (Opp. at 7) that the Third Circuit's explicit adoption of the district court's reasoning can be construed as a reference to an issue that the district court did not decide is simply untenable. Therefore, the issue

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[1] Although the waiver issue was never formally briefed in the Third Circuit, *see* Opp. at 5, 7, 12, the parties' papers on the motion for remand that the Third Circuit granted put before the court of appeals all the facts pertinent to the waiver issue, through attached declarations and other exhibits including the transcript of the telephonic hearing conducted by the district court.

posed in the petition for certiorari is squarely presented in this case.[2]

2. Petitioner demonstrated that no other court of appeals would find waiver in the circumstances posed in this case because other courts of appeals uniformly have held that mere participation in state court litigation does not constitute a waiver; instead, the defendant must affirmatively waive its right to removal in a "clear and unequivocal" manner. Pet. at 7-9. Respondent does not dispute that other courts of appeals, as well as numerous district courts, apply the "clear and unequivocal" standard to determine whether a litigation-based waiver of the right to removal has occurred. Instead, respondent asserts that "Third Circuit case law clearly embraces th[is] standard" and that the courts below applied it here. Opp. at 9-10.

Respondent's attempt to argue that the courts below applied the "clear and unequivocal" standard is unpersuasive. As respondent concedes, "the District Court did not expressly cite the 'clear and unequivocal' test," Opp. at 10, and the Third Circuit certainly did not do so. Nonetheless, respondent asserts (*id.* at 11) that the district court's decision

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[2] Because respondent erroneously characterizes the Third Circuit's remand order as based on a defect in removal procedure, there is no merit to her suggestion that this Court lacks jurisdiction to review that order. *See* Opp. at 7-8. As petitioner demonstrated, *see* Pet. at 6 n.2, the Third Circuit had appellate jurisdiction because the district court's "purely discretionary" order to remand based on waiver is within the class of orders that this Court found to be subject to appellate review in *Carlsbad Technology Inc.* v. *HIF Bio, Inc.*, 129 S. Ct. 1862, 1866 (2009). Accordingly, this Court has jurisdiction to review the Third Circuit's summary affirmance of the district court's order.

"reflects this standard," because the district court cited some opinions in which the proper standard was mentioned. But that is a far cry from showing that the standard was applied below. Moreover, a finding of waiver on the facts in this case is irreconcilable with the "clear and unequivocal" standard. Petitioner did not manifest an intention through affirmative actions or statements to remain in state court and forego the federal forum; to the contrary, its actions – an immediate effort to confirm the basis for, and file, a notice of removal, which it accomplished within less than six hours – revealed a "clear" and "unequivocal" intent to *assert* its removal rights.

The Third Circuit's holding therefore represents a sharp departure from the legal standards applied by other courts of appeals. Accordingly, even though other panels of the Third Circuit have referred in the past to the "clear and unequivocal" standard, the holding here is not faithful to that standard.

3. Having conceded that other courts of appeals uniformly apply the "clear and unequivocal" standard, respondent asserts that the Third Circuit's holding here is consistent with that standard because "the relevant distinction is between those cases that address the consequences of a waiver claimed to have occurred prior to trial, and those that address the consequences of a waiver claimed to have occurred during trial." Opp. at 8; see also *id.* at 20 (asserting that petitioner's cases all involved alleged waivers that occurred "well *before* trial commenced, not *during* the trial").

To be sure, courts applying the "clear and unequivocal" standard consider the defendant's conduct in light of the procedural posture of the case. Petitioner, however, in fact demonstrated (Pet. at 12) that the Third Circuit's finding of waiver here is at

odds with other cases *that involved alleged waivers during trial.* See *Heniford* v. *Am. Motors Sales Corp.*, 471 F. Supp. 328, 335 (D.S.C. 1979) (no waiver where defendant learned of removability during closing argument, but did not state intention to file for removal until the afternoon of the following day); *Johnson* v. *Celotex Corp.*, 701 F. Supp. 553, 556 (D. Md. 1988) (no waiver where defendant learned of removability after weeks of trial, but did not notify the court of its intent to remove until the following day). Respondent fails to address either of these *trial-stage* cases in her opposition, presumably because the courts declined to impose the instantaneous advance notice requirement that the Third Circuit imposed here, with the result that the defendants in *Heniford* and *Johnson* did not lose their removal rights, as petitioner will if the decision below is allowed to stand.

Respondent's attempt (Opp. at 18-20) to distinguish other cases cited by petitioner is unavailing. Petitioner demonstrated (Pet. at 10-11) that *Grubb* v. *Donegal Mutual Insurance Co.*, 935 F.2d 57 (4th Cir. 1991), *Rothner* v. *City of Chicago*, 879 F.2d 1402 (7th Cir. 1989), and *Akin* v. *Ashland Chemical Co.*, 156 F.3d 1030 (10th Cir. 1998), are all cases in which other courts of appeals held that defendants did not waive their removal rights merely by participating briefly and defensively in state court proceedings while they explored the possibility of removal. Indeed, the defendant in *Grubb* – much like petitioner here – participated in a hearing at the outset of which the case became removable for the first time and did not seek removal until a later date. Still, the Fourth Circuit held that such participation "did not show a 'clear and unequivocal' intent to waive its [removal] rights." *Grubb*, 935 F.2d at 58-59.

Respondent fails to show how the findings of no waiver in *Grubb*, *Rothner*, and *Akin* can be reconciled with the Third Circuit's contrary holding here.

These cases make plain that if petitioner's removal petition had been filed in another circuit, its statutory right to removal would not have been forfeited by its mere participation in jury selection, while it was diligently making certain that it could assert its removal rights. This sort of disparate outcome based on geography is intolerable and this Court should grant certiorari to prevent it.

II. THE COURT OF APPEALS' WAIVER STANDARD FAILS TO VINDICATE DEFENDANTS' "ABSOLUTE" FEDERAL RIGHT TO REMOVAL.

Petitioner also demonstrated (Pet. at 13-18) that the "clear and unequivocal" standard for waiver applied by other courts of appeals is the only standard that is faithful to the removal statute. In contrast, as petitioner demonstrated, the court of appeals' harsh standard – under which it found that petitioner waived its removal right notwithstanding the fact that it diligently *asserted* and *pursued* that right by promptly confirming the basis for removal and by preparing and filing a removal petition over the course of a few hours – is inconsistent with the deadlines in the removal statute (*id.* at 14-15); undermines the important interests protected by removal (*id.* at 16-17); and conflicts with the standard that federal courts use to determine waiver of federal statutory rights, such as the right to arbitration (*id.* at 17-18).

Respondent fails to respond to any of these points. Instead, respondent rebuts an argument petitioner never made: that the statutory right to removal

cannot be waived. Opp. at 13-14. Petitioner expressly acknowledged that "the right to removal, like virtually all other rights, can be waived." Pet. at 7. What petitioner did argue (and demonstrate) is that a federal right of this importance cannot be waived "through inadvertence or a few hours' silence by counsel," and instead can only be lost through affirmative actions or statements that manifest a clear intention to remain in state court. *Id.* at 14. Here, petitioner's swift filing of a notice of removal in federal court plainly belied any such intention.

Respondent also suggests that the court of appeals' standard and holding in this case are consistent with federal courts' recognition that the removal statute does not contemplate defendants "testing the waters" in state court and removing only when the state proceedings are not going well for them. Opp. 16-17, 20-21. In particular, respondent asserts that this is what petitioner did here. *Id.* at 20 (alleging that petitioner "evaluate[d] the composition of the jury before making a final decision on removal"). This speculative assertion, however, does not accord with the undisputed facts. As petitioner demonstrated and respondent does not dispute, jury selection was far from complete when petitioner's notice of removal was filed and, indeed, was *never* completed in this case, even though the state trial court continued with jury selection *after* receiving notice that the case had been removed. Pet. at 4, 16.[3] Accordingly, petitioner did not have a "compos[ed]" jury to evaluate at the time it filed for removal. In any event, the speed with which petitioner investigated the facts supporting

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[3] Respondent does not dispute that after petitioner became satisfied that the case could be removed because all remaining parties were diverse (after lunchtime around 1 p.m.), its counsel did not participate further in jury selection. *See* Pet. at 4.

removal and drafted the necessary papers belies any notion that it lingered for strategic reasons.

III. THE COURT OF APPEALS' WAIVER RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

Finally, petitioner demonstrated (Pet. at 18-21) that the court of appeals' waiver ruling poses an "important question" of federal law because the specific removal issue presented here is one that frequently arises in diversity cases and because this Court historically has steadfastly tried to ensure that federal courts address removal issues in a consistent manner.

Respondent makes no attempt to rebut petitioner's showing that courts often have to address potential waiver issues in cases that were not initially removable, but later became removable through new developments, such as settlements and changes in the parties. Pet. at 19-20. Indeed, as petitioner demonstrated, the recurring nature of this issue has been recognized by Congress. *Id.* at 19.

Petitioner further demonstrated that the recurring nature of this scenario is increased by the widespread practice of fraudulent joinder by plaintiffs. *Id.* at 20-21. As petitioner showed, this practice would only be encouraged if defendants are not able to eliminate such fraud through removal at whatever point the fraud comes to light, even if that is not until well into the pre-trial or trial proceedings. *Id.* This, however, is precisely what would happen under the Third Circuit's waiver standard because it gives rise to inadvertent losses of removal rights. Respondent fails to address this argument, asserting only that plaintiffs are unlikely to engage in fraudulent joinder to re-establish diversity that has been

destroyed, "in the short hiatus between the time a party informs a court of its decision to remove and perfects that removal." Opp. at 16. Regardless of how prevalent fraudulent joinder is in that particular circumstance – and such fraudulent joinder to thwart a removal petition did in fact occur in *Tedford* v. *Warner-Lambert Co.*, 327 F.3d 423, 427-28 (5th Cir. 2003), as respondent acknowledges (Opp. at 14-15) – petitioner raises broader concerns about fraudulent joinder that plaintiffs accomplish through their complaints and other conduct. Respondent has no answer to these concerns or to petitioner's showing that inadvertent waiver in the face of fraudulent joinder, as would occur under the Third Circuit's standard, should not be countenanced.

Respondent also fails to counter petitioner's showing (Pet. at 18-19) that this Court traditionally has granted certiorari to ensure uniformity on issues of federal procedure, such as removal. See Opp. at 13 (acknowledging that this Court repeatedly has addressed the procedures that govern removal, the scope of removal jurisdiction, and the provisions in the removal statute, 28 U.S.C. § 1447, that address appellate review of remand orders). The Court has previously done so to prevent uneven application of the removal statute in different circuits, which results in divergent outcomes, and should do so once again here.

CONCLUSION

For the foregoing reasons, and for those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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